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91-1988

No. _____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1991

FRANK LONGO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity as
Postmaster of the Torrington Post Office

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether United States Postal Service sidewalks, which connect post office parking lots to the main building, are either traditional or designated public fora.

2. Whether a United States Postal Service regulation, which prohibits "campaigning for election to any public office" on postal service property, is content-based.

3. Whether such a regulation can survive the applicable standard of review.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Petitioner,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Frank Longo respectfully requests that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on January 13, 1992.

OPINIONS BELOW

The January 13 opinion of the United States Court of Appeals for the Second Circuit is reported at 953 F.2d 790 (2d Cir. 1992) and is set forth in the Appendix to this Petition at 1A. The Order of the United States Court of Appeals for the Second Circuit, dated March 9, 1992, which denied Petitioner's Petition for Rehearing is set forth in the Appendix to this Petition at 17A.

The opinion of the United States District Court for the District of Connecticut, dated April 8, 1991, granting Petitioner's motion for summary judgment is reported at 761 F.Supp. 220 (D.Conn. 1991) and is set forth in the Appendix to this Petition at 19A. The judgment issued by the District Court on April 9, 1991, is set

forth in the Appendix to this Petition at 66A.

JURISDICTION

The United States Court of Appeals for the Second Circuit filed an opinion and entered a judgment on January 13, 1992. A timely Petition for Rehearing was filed by Petitioner. The Court of Appeals denied this Petition on March 9, 1992. This petition for a writ of certiorari is taken from the January 13, 1992 opinion and judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Section 221.654 of the Postal Service Manual, reported at 39 C.F.R. Section 232.1(h)(1),

are set forth in the Appendix to this Petition at 89A.

STATEMENT OF THE CASE

This case presents, in different circumstances, an issue which this Court addressed, but did not resolve, two years ago: the forum status of United States Postal Service sidewalks -- sidewalks, that is, that connect post office parking lots to the main building. See U.S. v. Kokinda, 497 U.S. ___, 110 S.Ct. 3115 (1990). Petitioner Frank Longo, an anti-establishment Connecticut politician who has been, at various times, Mayor of Bristol, Connecticut and an unsuccessful candidate for Governor, attempted to run as an independent for the United States Senate in the 1988 election. In order to collect the signatures he needed to appear on the ballot, he campaigned, as he had done in

the past, outside United States post offices. He viewed post offices as especially useful places for signature-gathering because they attract large numbers of literate patrons -- patrons, moreover, who are not encumbered by bulky items (as they might be at airports or shopping centers) and who are therefore likely to be receptive to political appeals. See Affidavit of Frank Longo, August 12, 1988, set forth in the Appendix to this Petition at 68A. His practice was to seat himself at a tiny, non-intrusive table on the sidewalk adjacent to the office and offer petitions to passers-by. At most locations he met with no objection, but the Torrington, Connecticut postmaster ordered him to leave, citing Postal Service regulation 39 C.F.R. Section 232.1(h)(1), a portion of which prohibits "campaigning for

election to any public office" on post office property.[1] When Longo refused, he was arrested. The charge was later dismissed, and Longo resumed his campaigning, but by then it was too late for him to collect the required signatures. Wishing to run, as an independent, for statewide office in the future, and hoping to use post office sidewalks for signature-gathering purposes, he brought this lawsuit.

PROCEEDINGS BELOW

Petitioner filed suit in August, 1989 in the United States District Court, District of Connecticut. He named, as defendants, the United States Postal

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1 Kokinda, in contrast, presented a challenge to another provision in the regulation that prohibited the solicitation of "alms and contributions," but the broad forum-categorization issues were the same.

Service and Torrington, Connecticut postmaster Alden Victoria. The suit, seeking declaratory and injunctive relief and attorneys' fees, was commenced pursuant to 42 U.S.C. Section 1983. It alleged that United States Postal Service Regulation 39 C.F.R. 232.1(h)(1), to the extent that it prohibited campaigning for office, was invalid, both facially and as applied, under the First Amendment to the United States Constitution.

In April, 1991, the district court granted summary judgment in Longo's favor. It found that the Torrington post office sidewalk was a non-forum, but concluded that the challenged regulation failed rational basis review because it was content-based and grossly underinclusive. 761 F.Supp. at 229-233. Appendix, at 50A-65A. An appeal was taken to the United

States Court of Appeals for the Second Circuit. On January 13, 1992, that court reversed the district court's judgment. Replicating its approach in International Society for Krishna Consciousness v. Lee, 925 F.2d 576 (2d Cir. 1991), cert. granted 112 S.Ct. 855, 116 L.Ed.2d 764 (1992), the court declined to categorize the forum, finding instead that the "no-campaigning" rule was a content-neutral regulation of time, place and manner that could survive scrutiny in any type of forum. 953 F.2d at 794. Appendix, at 8A. The regulation was content-neutral, in the court's view, because, although it regulated on the basis of subject-matter, it did not "reflect an attempt to regulate the scope of public debate." 953 F.2d at 797. Appendix, at 15A. Rather, its purpose was to insulate the Postal Service from the appearance and

reality of partisan political influence. 953 F.2d at 794-795. Appendix, at 9A. The court denied Longo's petition for rehearing, and suggestion for rehearing in banc, on March 9, 1992. Appendix, at 17A. In declining to categorize the forum, the Second Circuit implicitly acknowledged that Kokinda, because of its inability to muster a majority, had left this important issue unsettled and had, in the process, perpetuated a conflict among the Circuits.[2]

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[2] Compare U.S. v. Kokinda, 866 F.2d 699 (4th Cir. 1989), rev'd, 497 U.S. ___, 110 S.Ct. 3115 (1992) (post office sidewalks are traditional public fora); U.S. v. Belsky, 799 F.2d 1485 (11th Cir. 1986) (non-fora); U.S. v. Bjerke, 796 F.2d 643, 649 (3d Cir. 1986) and Monterey County Democratic Central Committee v. United States Postal Service, 812 F.2d 1194, 1198 (9th Cir. 1987) (designated fora, at least for the speech categories that the regulations allow); American Postal Workers Union v. United States Postal Service, 764 F.2d 858, 861 (D.C. Cir. 1985), cert. denied, 474 U.S. 1005 (1986) and National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717,

And, in pronouncing the "no-campaigning" rule content-neutral, the Second Circuit has placed itself in direct conflict with this Court's recent decision in Burson v. Freeman, No. 90-1056, 60 U.S.L.W. 4393 (May 26, 1992). Burson dealt with a statute, similar to the challenged rule in Longo, which singled out campaigning activity for disfavored treatment. All eight of the Justices who participated in Burson agreed that the statute was content-based. For all of these reasons, and, indeed, for any one of them, this Court should grant certiorari review.

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723 (7th Cir. 1984) (declining to categorize the forum).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S REFUSAL TO CATEGORIZE THE FORUM REFLECTS A CONTINUING CONFLICT AMONG THE CIRCUITS AND THE UNCERTAINTIES THAT HAVE RESULTED FROM THIS COURT'S INABILITY TO SETTLE THE CONFLICT IN KOKINDA.

Three years ago, this Court granted certiorari in Kokinda,[3] in order to decide whether post office sidewalks are traditional public fora, or at least designated ones, and thereby to dispel uncertainties that had divided the Circuits for much of the preceding decade.[4] But the decision did not resolve the forum status of the sidewalks, because no single position commanded majority support. Indeed, the Justices were unable to agree on a theory of forum analysis. The disagreements centered upon two issues, one

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[3] 493 U.S. 807 (1989).

[4] See n.2, supra.

pertaining to traditional public fora, the other to designated public fora.[5]

According to one view of traditional public fora, such fora include all government-owned sidewalks that are open to the public, regardless of their location, physical characteristics or uses.[6] That appeared to be the teaching of Frisby v. Schultz, 487 U.S. 474 (1988), which held that residential streets are traditional public fora even though they lack the shops, restaurants and other amenities that

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[5] The separation of government property into traditional public fora, designated public fora and non-fora originated with Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), and its basic principles are now sufficiently familiar that they need not be reiterated here.

[6] Sidewalks at military bases are excepted, because of the special nature and needs of the military community. Greer v. Spock, 424 U.S. 828 (1976).

typify downtown "Main Streets." Under this view, post office sidewalks, being open to the public, are traditional fora by definition. An opposing view postulates, however, that the forum label depends upon a close, fact-specific analysis of the sidewalk in question. In particular, if the sidewalk is "facilitative"--that is, if it exists solely to advance some special government function, in contrast to the multi-purpose Main Streets that have become the metaphor for the traditional forum--and if it is physically separated from municipal sidewalks and streets, it is a non-forum, and the government may prohibit most speech activities altogether, as long as the prohibition is rational. Post office sidewalks, in this view, would plainly be non-fora. Kokinda, 110 S.Ct. at 3120 (plurality opinion).

A similar dispute has surrounded the definition of the designated public forum. One theory maintains that whether a designated forum exists depends upon objective criteria. Thus, if wide varieties of expressive activities are permitted on the property, or even passively tolerated, the government is held to have created a designated forum for speech in general, and the selective exclusion of speech on a particular topic (such as campaigning for elective office) is subject to strict scrutiny. This theory found strong support in Widmar v. Vincent, 424 U.S. 263 (1981).[7] If applied to post office sidewalks, it would require them to be categorized as

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[7] Widmar held that a university that made its facilities available to student groups for discussion of an almost limitless range of subjects could not exclude groups of students who wished to use the facilities in order to pray.

designated fora, because most speech activities, other than campaigning, are allowed. Kokinda, 110 S.Ct. at 3132-3133 (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting).[8] There is, however, another, more restrictive view, originating in this Court's four-to-three decision in Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985).[9] That view

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[8] The few additional exclusions in the challenged regulation either do not turn upon subject-matter (e.g., the no-solicitation rule, which forbids in-person fund-raising regardless of whether the subject be charitable, political or other), or, in the case of commercial advertising--the only subject-matter prohibition--single out a subject-area that has received diminished First Amendment protection. See Board of Trustees, State University of New York v. Fox, 492 U.S. 469 (1989).

[9] Cornelius limits Widmar by emphasizing the resemblances between a university campus and traditional public fora--resemblances that received only passing mention in Widmar itself. Compare Cornelius, 473 U.S. at 803, with Widmar, 454 U.S. at 267, n.5.

holds that the designated forum is entirely a creature of government intent. As explained in Cornelius, this means, to begin with, that "[the] government does not create a public forum by inaction or by permitting limited discourse...." 473 U.S. at 802. Rather, it must explicitly open the forum to expressive uses. Id.; Kokinda, 110 S.Ct. at 3131 (plurality opinion). In addition, the government has almost unfettered discretion -- confined only by the rational basis standard and the First Amendment's bar against viewpoint-discrimination--to determine exactly what expressive uses may take place on the property. 473 U.S. at 806. In the words of the Second Circuit four years ago, Cornelius propounds that non-forum property "remains a nonpublic forum as to all unspecified uses." Deeper Life Christian

Fellowship, Inc. v. Board of Education of the City of New York, 852 F.2d 676, 679 (2d Cir. 1988). This analysis, if applied to the case at bar, would lead to the inescapable, albeit circular, conclusion that, since Postal Service regulations forbid political campaigning, the Postal Service has not "designated" its sidewalks as fora for campaigning activity. Indeed, those sidewalks would not even be designated fora with respect to the many speech activities that the regulations countenance, for Postal Service authorities have not expressly invited such activities; rather, the authorities have merely omitted to exclude them. Kokinda, 110 S.Ct. at 3121 (plurality opinion).

Kokinda settled neither of the two controversies. Its four-member plurality embraced the more restrictive view of

traditional and designated public forum analysis: the view that denies traditional public forum status to "facilitative" sidewalks, and grants to the government almost plenary power to decide what subjects may be discussed in a designated forum. The dissenters, also four in number, adopted the more permissive view -- the one that would treat all sidewalks, except on military bases, as traditional public fora, and would sharply limit the government's authority to forbid the discussion of particular topics in designated fora once the government has permitted a wide range of expressive activity to take place there.

Justice Kennedy, who cast the deciding vote for the government in Kokinda, found it unnecessary to categorize the forum because, in his view, the no-solicitation rule passed muster as a content-neutral

time, place and manner regulation in any type of forum. But his opinion has been read by many--including Kokinda's four dissenters, 110 S.Ct. at 3113, n.6--as strongly intimating that, if pressed, he would have joined the dissenters in categorizing the property as either a traditional forum, a designated forum, or both. (For instance, Professor Gerald Gunther, author of a widely used constitutional law casebook, finds it "[s]ignificant" that "the [plurality's]...standard did not attract a majority of the Court," and that "Justice Kennedy concurred only in the judgment and specifically distanced himself from the Cornelius approach." Gunther, Constitutional Law [12th Edition, 1991] at 1343.) In particular, Justice Kennedy wrote:

"..."[T]he public's use of postal property for communicative purposes means that the surrounding walkways may be an appropriate place for the exercise of vital rights of expression. As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place....There remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum.

"This is so even though the Government may intend to impose some limitations on the forum's use. If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case (citations omitted). While it is proper to weigh the need to maintain the dignity and purpose of a public building (citations omitted), other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended. Viewed in this light, the demand for recognition of

> heightened First Amendment protection has more force here than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose, as in [Perry] or [Cornelius]...."

110 S.Ct. at 3125 (Kennedy, J., concurring in the judgment). However, since Justice Kennedy did not formally resolve these intriguing questions, they remain open, and Kokinda, in consequence, has not only perpetuated, but compounded, the uncertainties that beset public forum jurisprudence. These uncertainties have been further compounded by the subsequent departures of Justices Brennan and Marshall from the Court.

As one manifestation of the uncertainties, the Second Circuit was careful, in Lee, not to decide whether airport terminals are traditional public

fora. Instead, the court took a narrow, fact-specific approach which attempted to extrapolate, from Kokinda, whether a majority of Kokinda's Justices--under whatever theory--would have sustained the particular regulations that the plaintiff challenged. With regard to the designated forum issues, the picture is no clearer. In Deeper Life, the Second Circuit had confidently proclaimed that, under Cornelius, the government retained complete subject-matter control in designated public fora, so that it might, for instance, open public school buildings to after-hours use by community groups for discussion of a nigh-limitless range of issues, yet ban religious activities. However, in Travis v. Owego-Apalachin School Dist., 927 F.2d 688 (2d Cir. 1991), a post-Kokinda case with similar facts, the court wavered on this

very question, and expressly refused to decide it. 927 F.2d at 694.[10]

Lee awaits decision by this Court as this petition is being written. But Lee will not necessarily control Longo's outcome. Lee certainly will not affect the designated forum question, because no such question is presented. And it may not resolve the traditional forum question either. As candidates for traditional forum status, post office sidewalks may pose different issues than airport terminals. On the one hand, they lack the shops, restaurants, and other Main Street-type features that the terminals possess. On the other hand, they attract more general

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[10] The court was able to avoid the necessity of deciding this question because there was evidence that the government had discriminated on the basis of viewpoint between different classes of religious speakers. Id.

audiences than terminals. Terminal audiences consist almost entirely of "travelers, persons meeting or seeing off passengers, members of flight crews, and employees of the terminal, an airline or a business in the terminal," Lee, 925 F.2d at 578. Post office audiences, in contrast, more nearly resemble the ones that gathered on Main Streets before society became "more insular," Kokinda, 110 S.Ct. at 3115 (Kennedy, J., concurring) and Main Streets, in consequence, ceased to be centers of American public life.[11] Post office sidewalks also differ from airport

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[11] The movement of America's population from the cities to the suburbs, which has diminished the importance of downtown Main Streets as places for discussion, was first documented by this Court in Amalgamated Food Employees, Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324 (1968). Logan Valley was overruled, on other grounds, in Hudgens v. NLRB, 424 U.S. 507 (1976).

terminals in that a post office's raison d'etre is to serve a communicative function, and this function arguably enhances the claim to public forum status. Kokinda, 110 S.Ct. at 3125 (Kennedy, J., concurring). These differences may call for separate consideration of petitioner's traditional public forum argument, even after Lee is decided.

The forum analysis issues presented in Longo are surely as important today as they were three years ago, when this Court granted certiorari in Kokinda in hopes of resolving them. They raise, in truth, the more fundamental question of whether the First Amendment is to serve as a communicative vehicle or merely as a cathartic one. As Justice Kennedy intimated in his Kokinda concurrence, the Main Streets of old are today emptied, and,

unless this Court identifies other "public places where traditional modes of speech and forms of expression can take place," large-scale communication will become the exclusive preserve of persons wealthy or powerful enough to command access to mass mailings or to the media. For less fortunate Americans, public expression on deserted Main Streets will serve to vent feelings, but not to exchange ideas.

Kokinda, far from answering the questions it set out to decide, has left those questions--if anything--even more unsettled than before. This Court should grant certiorari in order to resolve them once and for all.

II. THE SECOND CIRCUIT ERRED IN CHARACTERIZING THE "NO-CAMPAIGNING" RULE AS CONTENT-NEUTRAL, AND THAT ERROR PREVENTED THE COURT FROM CATEGORIZING THE FORUM AND APPLYING THE APPROPRIATE STANDARD OF REVIEW.

Review by this Court might be less imperative if the Second Circuit were correct in concluding that the "no-campaigning" rule is a content-neutral regulation of time, place and manner that could survive scrutiny in any forum. But its conclusion, in this regard, has been exploded by this Court's decision in Burson just two weeks ago. The challenged rule, in Burson, was almost identical to the one in Longo: it forbade campaigning in the traditional public fora adjacent to polling places on election day, while "allow[ing] expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerning issues

or candidates not on the day's ballot." 60 U.S.L.W. at 4402 (Stevens, O'Connor and Souter, JJ., dissenting).[12] Its purposes, moreover, were similar to those that the Second Circuit identified in Longo: namely, to protect the integrity of the electoral process. Nevertheless, all eight of the Justices who participated in Burson characterized the rule as content-based, because it discriminated on the basis of subject-matter: a subject-matter, at that, which implicates a major purpose of the First Amendment--the discussion of governmental affairs in the course of a campaign. 80 U.S.L.W. at 4395 (plurality opinion), 4399 (Kennedy, J., concurring),

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[12] The challenged Postal Service regulation likewise contains not one subject-matter exclusion of core speech, apart from the prohibition against campaigning for office.

4400 (Scalia, J., concurring) and 4401 (Stevens, O'Connor and Souter, JJ., dissenting).[13] If Burson's no-campaigning rule was content-based, so, manifestly, is the no-campaigning rule in Longo.[14]

In demolishing the Second Circuit's key premise--that the challenged rule is a content-neutral regulation that could survive scrutiny in any forum--Burson effectively holds that the Second Circuit ought to have confronted the question that it avoided, namely, the categorization of

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[13] Justice Thomas did not participate in the case.

[14] Burson's conclusion was neither novel nor surprising. It was clearly foreshadowed in Boos v. Barry, 485 U.S. 312, 319, 321 (1988), where this Court similarly identified a statute that discriminated on the basis of subject-matter as content-based, because the discriminatory law could be justified "only by reference to the content of speech." 485 U.S. at 321 (emphasis in original).

the forum, and applied the relevant standard of review, as was done in Burson itself. It is inconceivable that the no-campaigning rule in Longo could survive the strict scrutiny employed, in analogous circumstances, by seven of Burson's eight justices.[15] As Burson recognizes, "[to] survive strict scrutiny...a State must do more than assert a compelling state interest--it must demonstrate that its law is necessary to serve the asserted interest." 60 U.S.L.W. at 4396 (plurality opinion)(emphasis added).[16] When

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[15] Justice Scalia applied a rational basis standard because he believed that the streets and sidewalks outside polling places became, on election day, nonpublic fora.

[16] The dissenters, of course, concurred on this point; their complaint was that the evidentiary burden which the plurality placed on the State was insufficiently demanding. 60 U.S.L.W. at 4403.

legislating underinclusively, the government, in order to satisfy its burden, is not required to prove that the speech activities which it permits are innocuous. But it is most certainly required to prove that the speech activities which it forbids are dangerous. 60 U.S.L.W. at 4398 (plurality opinion). In Burson, the State met this burden by introducing "ample evidence" of fraud and intimidation resulting from campaigning at polling places in the past. Id. In Longo, however, there is no evidence whatsoever that campaigning on postal service property has compromised the political independence of the postal service or impaired public confidence in that independence -- the principal concerns identified by the Postal Service and the Court of Appeals. There is evidence, to be sure, that Congress

reorganized the Postal Service in 1970 in order to remove it from partisan politics. Longo, 953 F.2d at 794, Appendix, at 9A, citing H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S.Code Cong. & Admin.News 3649, 3661. But the politicization concerns that these documents reveal focus exclusively upon personnel matters: specifically, the loss of continuity resulting from rapid turnover of politically appointed staff, and the risks of improper Presidential influence upon politically appointed postmasters. The documents reflect no concerns, and no past problems, arising from the use of post office sidewalks by candidates campaigning for public office. Burson-type strict scrutiny in Longo, therefore, would be fatal to the challenged rule.

What is more, it is at least arguable that the rule, because of its gross underinclusiveness -- in particular, its toleration of other controversial partisan activity (e.g., petitioning by pro-choice or pro-life groups) -- would fail even rational basis review in a non-forum. Three of Kokinda's four dissenters pronounced that case's no-solicitation rule irrational, 110 S.Ct. at 3137-3139 (Brennan, Marshall and Stevens, JJ., dissenting). And in Burson, Justice O'Connor (who, significantly, wrote the plurality opinion in Kokinda) joined Justice Souter (who was not on the Court when Kokinda was decided) and Justice Stevens (one of the Kokinda dissenters) in finding the no-campaigning rule so underinclusive as to be unreasonable. See 60 U.S.L.W. at 4403 ("Tennessee's

differential treatment of campaign speech furthers no asserted state interest").[17] Thus, even if post office sidewalks are non-fora, the Second Circuit may have erred in holding the no-campaigning rule constitutional.

Whatever the proper outcome in Longo, the Second Circuit committed palpable error, in conflict with Burson and the precedents on which Burson relies,[18] by characterizing Longo's no-campaigning rule

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[17] Interestingly, the dissent also points out, 60 U.S.L.W. at 4402, that Burson's no-campaigning rule discriminates, in its impact, against "grassroots" candidates--the very point that the petitioner has made about the impact of the Postal Service's no-campaigning rule upon non-mainstream candidates like himself.

[18] See, especially, Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 537 (1980); Simon & Schuster, Inc. v. New York Crime Victims Bd., __ U.S. ___, ___ (slip op. at 9), cited 60 U.S.L.W. at 4395 (plurality opinion).

as content-neutral. And that error underscores the need to resolve Longo's unsettled forum categorization issues, not only to ensure a correct result in Longo itself, but -- even more importantly -- to provide guidance to lower courts, public officials and would-be speakers in the future.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. Alternatively, the case should be remanded for reconsideration in light of Burson, and possibly, depending upon its holding and rationale, of Lee, once that case is decided.

Respectfully submitted,

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No. _____

In The

Supreme Court Of The United States

October Term, 1991

FRANK LONGO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity as
Postmaster of the Torrington Post Office

Respondents.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 374—August Term 1991

(Argued October 23, 1991 Decided January 13, 1992)

Docket No. 91-6141

FRANK LONGO,

Appellee,

—v.—

UNITED STATES POSTAL SERVICE, *et al.*,

Appellants.

Before:

TIMBERS, WINTER and WALKER,

Circuit Judges.

Appeal from a summary judgment entered April 8, 1991, in the District of Connecticut, Allan H. Nevas, *District Judge*, 761 F. Supp. 220, holding unconstitutional as violative of the First Amendment a Postal Service Regulation which prohibited campaigning for election to pub-

lic office on Postal Service property at the Torrington, CT., Post Office.

Reversed.

ANDREW G. MCBRIDE, Associate Deputy Attorney General, (Stuart M. Gerson, Assistant Attorney General, Douglas N. Letter and Marc Richman, Attorneys, Dept. of Justice, Washington, D.C.; and Richard Palmer, United States Attorney, Bridgeport, CT., on the brief) *for appellants*.

MARTIN MARGULIES, Bridgeport, CT., *for appellee*.

TIMBERS, *Circuit Judge*:

Appellants United States Postal Service and Alden Victoria, in his official capacity as Postmaster of the Torrington Post Office ("the Postal Service"), appeal from a summary judgment entered April 8, 1991 in the District of Connecticut, Alan H. Nevas, *District Judge*, granting appellee Frank Longo summary judgment on his claim for declaratory and injunctive relief from a Postal Service regulation prohibiting campaigning for election to public office on Postal Service property on the ground that the regulation violated Longo's rights under the First Amendment on its face and as applied. In a comprehensive, well considered opinion, the district court held that the regulation, 39 C.F.R. § 232.1(h)(1) (1990),

is invalid to the extent that it prohibits campaigning on the interior post office walkway. 761 F.Supp. 220 (D.Conn. 1991)

On appeal, the government asserts that the district court correctly determined that the Postal Service property in question is a nonpublic forum, but contends that it erred in concluding that the regulation at issue is an unconstitutional restraint on expressive activity. Longo contends that the district court properly declared the regulation unconstitutional to the extent that it prohibits campaigning for election to public office on the exterior post office sidewalks; he also contends that the property in question is a public forum and that the regulation therefore should be reviewed under the strictest level of scrutiny.

For the reasons that follow, we reverse the district court's summary judgment which held that the prohibition set forth in § 232.1(h)(1) against campaigning for election to public office on an interior post office walkway is unconstitutional.

I.

The facts are not in dispute. They were set forth clearly in the district court's opinion. We summarize only those facts and proceedings believed necessary to an understanding of the issues raised on appeal.

In 1988, Frank Longo attempted to run for the United States Senate as an independent candidate from the State of Connecticut. Longo had to obtain approximately 9800 signatures in order to get on the ballot. On May 25, 1988, Longo set up a table and chair on the postal walkway adjacent to the entrance to the Post Office Building in Torrington. He began to solicit signatures in support of his candidacy. Postmaster Alden Victoria informed him that his action violated the Postal Service regulation set forth in 39 C.F.R. § 232.1(h)(1),

which prohibits "campaigning for election to any public office." After the postmaster asked him to leave the premises, and after the postmaster showed him a copy of the regulation, Longo refused to leave. When Longo continued to ignore the postmaster's request, he was arrested by the Torrington Police and charged with criminal trespass. On July 13, the charges against Longo were dropped in exchange for his promise to cease his campaign activities on postal property. Longo nevertheless returned to the same walkway on four occasions to solicit signatures. Several postal patrons complained that Longo was abusive when they refused to sign his petition or when they questioned his use of postal property for his signature campaign.

On August 12, Longo commenced this action seeking declaratory and injunctive relief. He asked that the postal regulation be declared unconstitutional as violative of the First Amendment's protection of freedom of speech and that further enforcement of the regulation be enjoined. He challenged the validity of the regulation on its face and as applied to him. As the district court found, the Torrington Post Office is located on property which is owned by the Postal Service. It is used exclusively for postal service operations. The interior postal walkway on which Longo attempted to solicit signatures for his campaign is adjacent to the entrance to the post office building. The walkway lies 289 feet from the nearest public thoroughfare, from which it is separated by the Post Office parking lot, driving lanes, and garage space for postal vehicles.

By the mutual agreement of the parties, Longo's action was stayed pending the Supreme Court's resolution of a similar issue in *United States* v. *Kokinda*, 110 S.Ct. 3115 (1990). In *Kokinda*, the Court addressed the constitutionality of the prohibition set forth in 39 C.F.R. § 232.1(h)(1) against "[s]olic-

iting alms and contributions" on postal property. *Kokinda* involved a postal walkway that is similar in all material respects to the walkway on which Longo attempted to solicit signatures for his campaign for the United States Senate. The Court found that the regulation prohibiting the solicitation of alms and contributions was constitutional. A plurality of four (opinion by O'Connor, J.) held that the walkway was a non-public forum and that the regulation was a reasonable, viewpoint-neutral restraint on First Amendment activity. Justice Kennedy, without categorizing the walkway in question as a specific type of forum, concluded that the regulation was an appropriate time, place and manner restriction. *Id.* at 3125.

II.

Since the facts are not in dispute, our task is to determine whether the district court correctly applied the law in granting Longo's motion for summary judgment. *City of Yonkers* v. *Otis Elevator Co.*, 844 F.2d. 42, 45 (2 Cir. 1988); Fed. R. Civ. P. 56(c). We hold that the district court erred in determining that the postal regulation at issue unconstitutionally prohibited Longo from campaigning for public office on postal property. We find that the regulation is a valid time, place and manner restriction on speech activity.

III.

(A)

It is undisputed that Longo's solicitation of signatures is a form of speech protected by the First Amendment. *See Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 629 (1980); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "Even protected speech," however, "is not equally permis-

sible at all times." *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 789 (1985).

The Supreme Court has developed a tripartite framework for analyzing First Amendment issues that arise when the government attempts to regulate expression on government property. This analysis focuses on the nature of the forum that the government seeks to regulate. Regulation of speech activity on property that traditionally has been open to the public for expression activity is subject to close scrutiny. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). "Public fora" are generally of the nature described by Justice Roberts when he stated:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Hague v. *C.I.O.*, 307 U.S. 496, 515 (1939). In these public fora the government may exclude communicative activity based on its content only if it can show that the regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Perry*, *supra*, 460 U.S. at 45; *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980).

The government also may enforce content-neutral time, place and manner restrictions in such public fora provided they are narrowly tailored to serve a significant government interest and alternative means of communication are left open. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, *supra*, 460 U.S. at 45. This same standard of scrutiny is applied to property that the government has dedicated to speech. *Perry*, *supra*, 460 U.S. at 46. As the district court stated, "the government does not cre-

ate a public forum through unconscious, unspoken practices or by permitting limited discourse but 'only by intentionally opening a nontraditional forum for public discourse.' " *Longo*, *supra*, 761 F.Supp. at 226 (quoting *Cornelius*, *supra*, 473 U.S. at 802); *see also Paulsen* v. *County of Nassau*, 925 F.2d 65, 69 (2 Cir. 1991). Such areas when so dedicated by the government are referred to alternatively as "limited" public fora, *Perry*, *supra*, 460 U.S. at 47, or as "designated" public fora, *Cornelius*, *supra*, 473 U.S. at 802. Nonpublic fora, those which are neither a traditional nor dedicated public forum, are subject to a different standard of review. Regulation of speech activity on such property must be *reasonable* and not based on the *viewpoint* of the speaker. *United States* v. *Kokinda*, 110 S.Ct. 3115, 3121 (1990) (plurality opinion); *Perry*, *supra*, 460 U.S. at 46.

In *Kokinda*, the plurality of four justices (opinion by O'Connor, J.) found that the postal walkway in question was a nonpublic forum and held that the regulation was both reasonable and viewpoint-neutral. Justice Kennedy joined in the judgment of the plurality, but stated that the forum analysis applied by the plurality fails adequately to protect First Amendment interests. Although Justice Kennedy did not definitively find that the postal walkway was a public forum, he stated that "heightened First Amendment protection" was appropriate in order "to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, *supra*, 110 S.Ct. at 3125. Justice Kennedy joined in the judgment of the plurality because he found that § 232.1(h)(1)'s prohibition of "[s]oliciting alms or contributions," was an appropriate time, place, and manner restriction on protected speech. *Id.* at 3125-26.

In our recent decision in *International Soc'y For Krishna Consciousness, Inc.* v. *Lee*, 925 F.2d 576 (2 Cir. 1991), we did not reach the issue of whether airport terminals are tra-

ditional, designated, or nonpublic fora. Instead, we upheld a prohibition on the in-person solicitation of funds in airport terminals because it satisfied the criteria set forth by both the plurality and Justice Kennedy in *Kokinda*. Similarly, since we find that the postal regulation here involved is an appropriate time, place and manner restriction, it is unnecessary to categorize the postal walkway as a particular type of forum.

(B)

Time, place or manner restrictions on expressive activity are constitutional, regardless of the type of forum involved, provided they are reasonable. *Perry*, *supra*, 460 U.S. at 46; *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 536 (1980); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972). The Supreme Court has developed a test for determining whether a time, place or manner restriction is in fact reasonable: it must be narrowly tailored to serve a significant government interest, alternative means of communication must be left open, and the restriction on speech must be content-neutral. *Rock Against Racism*, *supra*, 491 U.S. at 791; *Clark*, *supra*, 468 U.S. 293; *Heffron*, *supra*, 452 U.S. at 648.

The postal regulation involved in the instant case is justified by different purposes than was the regulation in *Kokinda*. The primary justification for the prohibition against campaigning on postal property is that it enables the Postal Service to avoid both actual entanglement in partisan politics and the appearance of political favoritism. Longo asserts that there is insufficient basis for a conclusion that such entanglement would occur absent the regulation at issue. The validity of the regulation, however, "need not be judged solely by reference to the [expressive activity] at hand."

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984).

If campaigning for public office on public property were not prohibited, the Postal Service surely would be beset by requests from eager politicians competing for time and space in the most strategic locations possible, such as the postal walkway involved in this case. Postmasters therefore would be hard pressed to avoid the sort of embroilment in partisan politics that Congress tried to prevent when it reorganized the Postal Service in 1970. *See* H.R. Rep. No. 1104, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong & Admin. News 3649, 3661 ("[O]ne of the cardinal needs of postal reform is to seal off the Postal Service from partisan political influence."); *Id.* at 3654 ("If the American public is to have the postal service that it expects and deserves, the Post Office must be taken out of politics and politics out of the Post Office."). Also, the Supreme Court has upheld the provision of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1982), which forbids federal employees from playing "an active part in political management or in political campaigns." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding same language).

Moreover, on several occasions the Supreme Court has recognized that the avoidance of partisan entanglement or the appearance of political favoritism is a valid justification for restricting First Amendment speech activities. *E.g.*, *Cornelius*, *supra*, 473 U.S. at 809 ("[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum."); *Greer* v. *Spock*, 424 U.S. 828, 839 (1976) ("[K]eeping official military activities there wholly free of *entanglement with partisan political campaigns of any kind*" deemed "a policy that the military authorities at Fort Dix were constitutionally free to pursue.") (emphasis added); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974)

("[L]urking doubts about favoritism, and sticky administrative problems [that] might arise in parceling out limited space to eager politicians" helped justify a policy of not permitting political advertising while permitting other types of advertising on city's mass transit cars.).

We therefore hold that the Postal Service's interest in avoiding partisan political entanglement and the appearance of political favoritism is at least as significant as the governmental interests in "preventing 'visual blight' in its cities, *Members of City Council of Los Angeles* v *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), in 'maintaining [public] parks . . . in an attractive and intact condition,' *Clark*, *supra*, 468 U.S., at 296, and in 'avoiding congestion and maintaining the orderly movement' of persons using a public forum, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981) . . . ." *Kokinda*, *supra*, 110 S.Ct. 3126 (Kennedy, J., concurring) (parallel citations omitted).

We next consider whether the prohibition set forth in § 232.1(h)(1) against "campaigning for election to public office" is narrowly tailored to achieve its desired purpose and whether it leaves open adequate alternative channels for communication. We find that the postal regulation meets both of these criteria.

We recognize that a complete ban on a category of speech activity generally is considered narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Shultz*, 487 U.S. 474, 485 (1988). In *Frisby*, the Court cited *Vincent*, *supra*, 466 U.S. at 789, as an example of a complete ban that was constitutional. The *Frisby* Court stated that the regulation in *Vincent*, which banned all signs on public property, was constitutional because the interest supporting the regulation, avoiding visual blight, rendered each sign a targeted evil. *Frisby*, *supra*, 487

U.S. at 485-86 (citing *Vincent*, *supra*, 466 U.S. at 810); *see also Clark*, *supra*, 468 U.S. at 297.

Just as some types of signs would create less visual blight than others, some forms of political campaigning, such as the handing out of leaflets, no doubt would cause less physical disruption of postal activities and would put less pressure on the Postal Service to handle competing demands for time and space, than did Longo's attempt to solicit signatures. They would all risk, however, embroiling the Postal Service in partisan politics to some degree. Furthermore, other types of campaigning, such as the setting up of campaign displays or the staging of mini-rallies would disrupt postal activities and entangle the Postal Service in partisan politics even more than Longo's attempts to solicit signatures. The regulation therefore properly focusses on the "targeted evil". It does not proscribe a wide range of other speech activity, such as the discussion of political issues, or the expression of one's views on an upcoming election and the candidates who are running therein. We hold that the prohibition of campaign activity on postal premises in § 232.1(h)(1) is sufficiently narrow to pass scrutiny.

The postal regulation leaves open adequate alternative means of communication. As stated above, the regulation allows members of the public to engage in a wide variety of expressive activity. It only prohibits campaigning for public office on postal property. Politicians remain free to campaign on any street, sidewalk, park or other traditional public forum, and they may utilize the various news media and the mail as well. *Clark*, *supra*, 468 U.S. at 295.

We turn now to the final criteria for measuring the reasonableness of time, place and manner restrictions: content neutrality.

The term "content" embodies several related, yet different, concepts. In *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), the Court stated that restrictions on speech should not "restrict expression because of its message, its ideas, its subject matter, *or* its content." *Id.* at 95 (emphasis added). Although in *Mosley* the Court spoke of "content" in the alternative, all of the factors referred to in *Mosley* as impermissible bases for restrictions on expression have fallen under the rubric of "content". The *Mosley* court itself stated that "[t]he essence of this forbidden censorship is content control." *Id.* at 96.

Restrictions on expression because of disagreement with message or idea being conveyed by the speaker clearly violate the First Amendment. Such viewpoint-based restrictions would "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Mosley*, *supra*, 408 U.S. at 96 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Indeed, viewpoint-based restrictions are viewed as more threatening to First Amendment rights than are other forms of content-based restrictions on speech. Under the tripartite forum analysis the Supreme Court has adopted in recent years reasonable restrictions on expression in a non-public forum are constitutional provided only that they not discriminate on the basis of *viewpoint*; other forms of *content* discrimination are permissible. *E.g.*, *Kokinda*, *supra*, 110 S.Ct. at 3121; *Pery*, *supra*, 460 U.S. at 46. Even with time, place, and manner restrictions on speech in a public forum, the Court has at times focussed on viewpoint neutrality. *E.g.*, *Rock Against Racism*, *supra*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it

conveys.") The distinction between content and viewpoint neutrality, however, occasionally is blurred. *See, e.g., Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (Park regulation permitting camping only in certain areas of the park "clearly satisfied" requirement that it be "content-neutral" because it was "not being applied because of disagreement with the message presented."); *U.S Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U.S. 114, 135 (1981) (Postal regulation prohibiting unstamped "mailable matter" in a letter box "is content-neutral because it is not directed at the content of the message appellees seek to convey . . . .") (Brennan, J., concurring).

A viewpoint-based restriction on expressive activity, however, is not the only form of impermissible content control. Regulations that foreclose discussion of a particular subject matter entirely (i.e. regardless of viewpoint), or that allow expression relative to some topics but not to others, have been held unconstitutional as content-based restrictions. *E.g., Widmar* v. *Vincent*, 454 U.S. 263 (1981) (University's regulation prohibiting the use of the University's buildings or grounds "for purposes of religious worship or religious teaching" held unconstitutional as a content-based restriction on speech); *Carey* v. *Brown*, 447 U.S. 455 (1980) (Regulation allowing peaceful labor picketing but prohibiting other types of peaceful picketing held unconstitutional as based on the content of the speech.); *Mosley, supra*, 408 U.S. 92 (same).

In *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980), the Court recognized that such restrictions on speech are more precisely described as based on subject matter rather than "content." *Id.* at 536 (citing *Mosley, supra*, 408. U.S. at 282). The Court held that the regulation prohibiting the inclusion, in monthly bills, of inserts discussing controversial issues of public policy was based on subject matter and therefore violated the First Amendment. The First

Amendment prohibits the regulation of speech based on subject matter because the government must not be allowed to "select which issues are worth discussing or debating . . . ." *Mosley*, *supra*, 408 U.S. at 96; *see also Consolidated Edison*, *supra*, 447 U.S. at 538 ("To allow a government a choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

The prohibition set forth in § 232.1(h)(1) against "campaigning for election to public office on postal property" is decidedly viewpoint neutral. Whether a candidate is a member of the Republican, Democratic, Libertarian or other party, and whether he or she espouses a philosophy that strikes a resonant chord with conservatives or liberals, he or she is not allowed to campaign on postal property. The regulation, however, is somewhat based on subject matter. It prohibits only speech activity that constitutes "campaigning for election to public office," while other speech activity, such as the handing out of leaflets in support of a cause, is allowed.

Although the regulation thus is content-based, when the term "content" is given its most inclusive construction, the blanket prohibition against campaigning does not reflect an attempt by the government to select the subjects that may be discussed publicly, *c.f. Mosley*, *supra*, 408 U.S. at 96, nor does it in any way suggest that the government is attempting to "control the search for political truth." *C.f. Consolidated Edison*, *supra*, 447 U.S. at 538.

Moreover, the Supreme Court has recognized that "in narrow circumstances . . . the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Id.* at 538-39 (citing *Greer* v. *Spock*, 424 U.S. 828 (1976) and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974)). Specifically, in both *Greer* and *Lehman*, the Supreme

Court upheld the constitutionality of restrictions that singled out partisan political speech, while allowing speech as to other subject matters, because such partisan speech would disrupt the legitimate purpose to which the property had been dedicated. *See Consolidated Edison, supra*, 447 U.S. at 538-39 (discussing *Greer* and *Lehman*).

We therefore find that, in view of the nature of the governmental interest served by the regulation prohibiting campaigning on postal property and the fact that the regulation neither discriminates on the basis of viewpoint nor restricts the scope of the public debate, the regulation is sufficiently content-neutral to pass scrutiny as a reasonable time, place and manner restriction.

This Postal Service regulation is a reasonable time, place and manner restriction on protected speech on postal walkways. It serves a significant governmental interest, is narrowly tailored to achieve its objective, and leaves open adequate alternative means of communication. Furthermore, the regulation does not discriminate on the basis of viewpoint, nor does it reflect an attempt to regulate the scope of public debate. We therefore hold that the prohibition in 39 C.F.R. § 232.1(h)(1) against "campaigning for election to public office" is a valid restraint on expression.

IV.

Longo also challenges the postal regulation on its face, asserting that the regulation's proscription against campaigning is so overbroad that it would have a deterrent effect on free expression. Under *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973), "the overbreadth of a statute [or regulation] must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Although

"[t]he concept of "substantial overbreadth is not readily reduced to an exact definition . . . [i]t is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, *supra*, 466 U.S. at 800.

In the instant case, Longo does little more than suggest that there could be applications of the proscription in § 232.1(h)-(1) against campaigning on postal property that would prove unconstitutional. In light of this we abide by the general rule that "a litigant only has standing to vindicate his own constitutional rights." *Id.*. Longo's facial challenge of the postal regulation therefore is dismissed.

V.

To summarize:

The district court erred in determining that the postal regulation prohibiting campaigning for public office on postal property violates the First Amendment as applied to postal walkways. We hold that the regulation survives constitutional scrutiny as an appropriate time, place and manner restriction.

We reverse.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of March one thousand nine hundred and ninety-two.

FRANK LONGO,

Appellee,

v.

DOCKET NUMBER:
91-6141

UNITED STATES
POSTAL SERVICE,
et al.,

Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for

rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,

Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 (AHN)

UNITED STATES POSTAL SERVICE, et al.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this case, the plaintiff, Frank Longo ("Longo"), sues the defendant, the United States Postal Service ("USPS"), for violating his constitutional rights under the First and Fifth Amendments to the United States Constitution by preventing him from soliciting signatures on a petition enabling him to run for political office. The plaintiff alleges that the section of 39 C.F.R. §232.1(h)(1) (1985) prohibiting campaigning for election to public office on Postal Service Property violates the First Amendment both on its face and as applied. Pending are cross

motions for summary judgment, pursuant to Rule 56, Fed. R. Civ. P. For the reasons stated below, the plaintiff's motion for summary judgment is granted and the defendant's motion for summary judgment is denied.

I.

A.

The undisputed facts[1] sketch the following narrative. In 1988, the plaintiff, Frank Longo, a long-time participant in state and local politics, attempted to run for the United States Senate from Connecticut as an independent candidate. In order to qualify for a place on the ballot, he was required to collect approximately 9800 signatures on petitions. On May 25, 1988, Mr. Longo attempted to

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[1] The parties stipulated to the material facts not in dispute. See Parties' Joint Statement of Material Facts Not in Dispute (filing 25).

solicit signatures in support of his candidacy at the Torrington Connecticut Post Office. At that time he set up a table and chair on the interior postal walkway adjacent to the entrance of the Post Office Building. Postmaster Alden Victoria informed Mr. Longo that such actions violated the USPS regulation set forth in 39 C.F.R. §232.1(h)(1),[2] and directed him to leave the premises. When he refused, Mr. Longo was shown a copy of the regulation. For his continued refusal to leave, he was

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[2] The regulation at issue, contained in the Postal Service Manual Section 221.654, provides in pertinent part:

> (h) Soliciting, electioneering, collecting debts, vending and advertising. (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.

39 C.F.R. §232.1(h)(1) (emphasis added).

arrested by the Torrington Police for Criminal Trespass. On July 13, 1988, the charges against Mr. Longo were dropped in exchange for his promise to comply with the regulation. Nevertheless, Mr. Longo returned on four separate occasions between July 25 and August 12, 1988 to solicit additional signatures for his petition, each time setting up a table and chair on the same interior walkway.[3] During these latter occasions, several postal patrons complained that Mr. Longo was abusive when they refused to sign his petition or when they questioned him as to his reasons for using Postal Service property.

The Torrington Connecticut Post Office is located on property owned by the Postal

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[3] Because the May 25th incident was still under review by Postal Service Officials, it was decided that no further action would be taken pending completion of the review.

Service which is used exclusively for postal service operations. The postal service-owned lot is surrounded by public, municipal sidewalks and streets, and the post office building is separated from those sidewalks and streets by an interior postal walkway, a parking lot, driving lanes and garage space for postal service vehicles. (See Appendix A). The interior postal service walkway is adjacent to and leads to the entrance to the post office building. This walkway provides the only means by which customers of the post office may travel from the parking lot to the post office building.

B.

Although the complaint was filed on August 12, 1988, the suit was stayed by mutual agreement of the parties when the United States Supreme Court granted certiorari in United States v. Kokinda, 866

F.2d 699 (4th Cir. 1989), cert. granted, 110 S.Ct. 47 (1989). See Order on Parties' Joint Motion to Stay Further Proceedings Pending Supreme Court Decision, October 16, 1989 (filing 35). Kokinda involved the ban on solicitation of alms and contributions prohibited by the same post office regulation at issue in the instant case. The third, ninth, eleventh and D.C. circuits had held that postal walkways are nonpublic fora; the fourth circuit in Kokinda had reversed the district court's holding that the exterior postal sidewalk was a nonpublic forum.[4] The parties in the

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[4] Prior to the Supreme Court's reversal of the fourth circuit's holding in United States v. Kokinda, 866 F.2d 699 (4th Cir. 1989) the Circuit Courts of Appeals were in conflict with respect to the proper forum designation to be applied to post offices situated similarly to the instant post office. All of the Circuit Courts of Appeals that had addressed this issue, with the exception of the fourth circuit, had found that postal premises are not traditional public fora. See Monterey

instant case expected that the Supreme Court's ruling in Kokinda would decide whether exterior postal sidewalks are public fora. In Kokinda, 110 S.Ct. at 3115, the Supreme Court in a 5-4 decision sustained the no-solicitation of funds rule. Four of the justices in Justice O'Connor's plurality held that exterior postal sidewalks are not public fora. Justice Kennedy concurred in the judgment only and noted that he found it unnecessary to decide the public forum issue because he believed that even in a public forum, the no-solicitation of funds rule would pass time, place, and manner review. Kokinda, 110 S.Ct. at 3125-26. The four dissenting

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Democratic Cent. Comm. v. United States Postal Serv., 812 F.2d 1194 (9th Cir. 1987); United States v. Belsky, 799 F.2d 1485 (11th Cir. 1986); United States v. Bjerke, 796 F.2d 643 (3rd Cir. 1986); Am. Postal Workers Union v. United States Postal Serv., 764 F.2d 858 (D.C. Cir. 1985).

justices (Brennan, Blackmun, Marshall, and Stevens) concurred that exterior postal sidewalks are public fora.

After Kokinda was decided, the parties filed supplemental memoranda to their cross-motions for summary judgment. This court heard oral argument on December 3, 1990. The plaintiff now argues that Justice Kennedy, if considering the no-campaigning part of the rule rather than the no-solicitation of funds subsection, would have joined the dissenters in the view that exterior postal sidewalks are public fora.

The defendants, on the other hand, argue that the Kokinda plurality decided the issue at stake in the instant case, that exterior postal sidewalks are nonpublic fora, and that the ban on campaigning challenged here is content-neutral, since, as with the ban on the solicitation of funds at issue in Kokinda,

"it is needed to avoid the inherent delays and disruptions caused by such activity, the uncomfortable even intimidating or confrontational atmosphere it can create, and the administrative burden that would be imposed on postal officials if a case-by-case regulatory approach were required." Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, at 3 (filing 24). Thus the defendants argue that Kokinda fully supports their position that the ban on political campaigning in 39 C.F.R. §232.1(h) is a reasonable and content-neutral regulation which passes constitutional muster under either the reasonableness standard applicable to nonpublic fora or under time, place and manner review.

C.

To prevail on a Rule 56 motion, a movant must demonstrate "that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. On a motion for summary judgment, the court does not try issues of fact, and summary judgment is inappropriate where factual issues are in dispute. 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice, para. 56.04 (2d ed. 1988). The burden of demonstrating the absence of a genuine issue rests with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). This burden does not shift when cross-motions are before the court: each motion must be judged on its own merits. Schwabenbauer v. Bd. of Ed., 667 F.2d 305, 314 (2d Cir. 1981). Pursuant to Rule 16, Fed. R. Civ. P., and Rule 9(c), R. Civ. P. (D. Conn.), the parties have stipulated to material facts in conjunction with their cross-motions for summary

judgment. Thus, in the instant matter, the parties are not in dispute as to the material facts; instead, they differ in their interpretations of the law applicable to the case. Because resolution of questions of law is uniquely a judicial function, the court finds that the cross-motions have placed the disputed issues squarely before the court.

II.

It is established that campaigning for public office is an activity that may receive First Amendment protection. See Buckley v. Valeo, 424 U.S. 1 (1976);[5] Meyer

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[5] In Buckley v. Valeo, the Court struck down legislation limiting campaign expenditures, referring to such expenditures as "core First Amendment expression" since "advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. at 48. Thus the First Amendment "has its fullest and most urgent application

v. Grant, 486 U.S. 414, 424 (1988).[6] On the other hand, under appropriate circumstances, the government may, consistent with the Constitution, limit the exercise of First Amendment rights on public property.[7] "[T]he First Amendment

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precisely to the conduct of campaigns for political office." Id. at 15.

[6] In Meyer v. Grant, the Supreme Court characterized the circulation of an "initiative" petition by proponents of a new law or amendment who may have their proposal placed on the ballot at a general election if they can obtain enough signatures of qualified voters in a six-month period, as "involv[ing] the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" Meyre, 486 U.S. at 422.

[7] It is well established that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . ." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961). This distinction was reflected in the Supreme Court's opinion in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) which upheld a

does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981). The question presented in the instant case is whether the USPS restriction prohibiting campaigning for public office on post office property is a permissible one.

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ban on political advertisements in city transit vehicles:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303.

In balancing the government's interest in limiting the use of its property against the interest of those who wish to use the property for expressive activity, the Supreme Court has classified government owned property into three categories: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). Accordingly, the Court established that the ability of the government to restrict First Amendment activity on public property is not absolute but rather depends on "the character of the property at issue." Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

A.

In Perry, the Supreme Court announced a tripartite framework for determining how First Amendment interests should be

analyzed with respect to government property. 460 U.S. at 44-46.[8] In places which by long tradition or by government fiat have been devoted to assembly and debate, the right of the government to limit expressive activity is sharply circumscribed. Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986) (quoting Perry, 460 U.S. at 45). At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

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[8] The Court's three-tiered framework focuses on the purposes and attributes of the forum rather than the speaker's desired audience and has become "the governing paradigm where. . . a court must ascertain whether to apply strict scrutiny or some less demanding standard." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 1991 U.S. App. Lexis 2264 (Feb. 8, 1991 2d Cir.).

Perry, 460 U.S. at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). In these quintessential public forums, the government authority to regulate speech is limited; in such places communication may not be completely prohibited. Perry, 460 U.S. at 45. For the government to enforce a content-based exclusion, it must demonstrate that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. Carey v. Brown, 447 U.S. 455, 461-62 (1980). The government may also enforce regulations of the time, place and manner of expression which are content-neutral and narrowly tailored to serve "a significant government interest, and leave open ample alternative channels of communication." Perry, 460 U.S. at 45 (citations omitted).

The second category consists of public

property opened and designated by the state for use by the public as a place for expressive activity. Courts refer to such fora as "limited" public fora, Perry, 460 U.S. at 47, or public form "by designation." Cornelius, 473 U.S. at 802. This type of public forum will often be very narrowly defined since the government does not create a public forum through unconscious, unspoken practices or by permitting limited discourse but "only by intentionally opening a nontraditional forum for public discourse." Id.; see also Paulsen v. County of Nassau, 925 F.2d 65 (2d Cir. 1991) (Nassau Colisuem held to be a limited public forum).[9] The Constitution forbids the government from enforcing

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[9] The Paulsen court reasoned that once the county opened the stadium grounds to various non-commercial activities, it could not constitutionally ban speech activities such as leafletting.

certain exclusions from a forum generally open to the public even if the government was not required to create the forum in the first place. See Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) (university meeting facilities).[10] Although the government need not retain indefinitely the open character of the facility, as long as it does so, First Amendment questions involving these places are controlled by the rules applicable to traditional public fora. Perry, 460 U.S. at 46. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to

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[10] A public forum may be created for a limited purpose such as use by certain groups. In Widmar, the Supreme Court held that a State University's exclusionary policy toward religious student organizations conducting meetings in school buildings where other student organizations were permitted to conduct meetings violated the principle that a state regulation of speech should be content-neutral.

effectuate a compelling state interest. Widmar v. Vincent, 454 U.S. at 269-70.

The third category consists of nonpublic fora.[11] Such property, which is neither by tradition nor by designation a forum for public communication, is governed by different standards. Property may be designated nonpublic regardless of whether it is owned by a private individual or by a government entity. The Supreme Court has recognized that the "[F]irst Amendment does

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[11] In addition to Kokinda, the Supreme Court has found nonpublic fora in the following cases, meriting an inquiry as to reasonableness and content-neutrality: Cornelius v. NAACP Legal Def. & Ed. Fund, 473 U.S. 788 (1985) (federal workplace not a public forum); Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system not a public forum); United States Postal Serv. v. Greenburgh, 453 U.S. 114 (1981) (letterbox not a public forum); Greer v. Spock, 424 U.S. 828 (1976) (sidewalks in military base not a public forum); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city bus not a public forum); Adderley v. Florida, 385 U.S. 39 (1966) (prison not a public forum).

not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Greenburgh, 453 U.S. at 129. In addition to time, place and manner regulations, the government may reserve a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Perry, 460 U.S. at 46 (citing Greenburgh, 453 U.S. at 131, n.7). "'"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."'" Greenburgh, at 129-30 (quoting Greer v. Spock, 424 U.S. 828, 836 (1976), in turn quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

The plaintiff contends that, although

the sidewalk on which he was campaigning is on postal service property, it is not distinguishable from other municipal sidewalks and must therefore be a traditional public forum subject to strict scrutiny. This argument is unpersuasive since the physical characteristics of the property alone cannot dictate forum analysis.[12] Kokinda, 110 S.Ct. at 3120. The mere fact that a walkway is a public sidewalk does not in itself identify it as a public forum. See United States v. Grace, 461 U.S. 171 (1983). Moreover, that a sidewalk is situated on publicly owned property, without more, is insufficient to

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[12] If this were not so, then Greet v. Spock, 424 U.S. 828 (1976) would have been decided differently. In Greer, the Supreme Court held that even though a military base permitted free civilian access to certain unrestricted areas, the base was a nonpublic forum. The presence of sidewalks and streets within the base did not require a finding that it was a public forum. Id. at 836-38.

accord it public forum status, Monterey County Democratic Central Comm. v. United States Postal Serv., 812 F.2d at 1197 (9th Cir. 1987), since the "state, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, 47 (1966).

As the Supreme Court recognized in Grace, 461 U.S. at 178, the location and the purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum. Drawing authority from the Greer Court's distinction between the military walkways and the municipal walkways within the military base, the Court in Grace constructed a rule stressing the separateness of such military walkways from the municipal ones: the rule allows the

government to overcome the presumption that sidewalks are public fora when he federally owned sidewalk obviously is separate from municipal sidewalks, apprising those who approach of the difference. Grace, 461 U.S. at 180.

The Court in Grace was asked to strike down a statute prohibiting certain expressive activities on the Supreme Court grounds and the sidewalk forming the perimeter. The Court distinguished Greer, finding that the sidewalks surrounding the Supreme Court retained their public forum status because "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." Id. (emphasis added). The Court stated that "[t]he sidewalks comprising the outer

boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C.," id., at 179, and discerned no reason why they should be treated differently.

Postal entryways, like the military walkways at issue in Greer, may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment. Kokinda, 110 S.Ct. at 3120. In examining a challenge to the ban on solicitation of funds on Post Office property under 39 C.F.R. §232.1(h)(1), the "enclave" distinction in Grace was pivotal to the Kokinda Court's designation of the sidewalk at issue as a non-public forum. In Kokinda, the post office was described as follows:

> [T]he Bowie post office is a freestanding building with its own sidewalk and parking lot. It is

> located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

110 S.Ct. at 3118.

The layout of the post office in Kokinda is virtually identical to the layout of the Post Office in Torrington, Connecticut at issue in the instant challenge to 39 C.F.R. §232.1(h)(1). (See Appendix A). Both are located on property owned by the Postal Service and are used exclusively for postal service operations. Both lots are surrounded by public, municipal sidewalks and streets, with the buildings separated from those sidewalks and streets by an interior postal walkway,

a parking lot, driving lanes and garage space for postal service vehicles. Additionally the interior postal service walkways, adjacent to and leading to the entrance to the post office buildings, provide the only means by which post office customers may travel from the parking lots to the post office buildings. Thus, the Torrington post office walkway, like the post office walkway in Kokinda, resembles the "special type of enclave" described as lacking in Grace.

In the instant case, the postal sidewalk at issue has no more of the characteristics of public sidewalks traditionally open to expressive activity than the sidewalk scrutinized in Kokinda. Unlike traditional municipal sidewalks, the instant sidewalk, like the one in Kokinda, runs alongside a post office building that is separated from the municipal property by

a parking lot and driving lanes and leads only from the parking area to the front door of the post office. The walkway is 289 feet from Connecticut Route 4, the street running along the front of the postal premises. Further, the property itself is dedicated solely to postal operations. As in Kokinda,

> [U]nlike the public street described in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981), which was 'continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment,' id, at 651, 101 S.Ct. 2566, the postal sidewalk [which leads only from the parking area to the front door of the post office] was constructed solely to provide the passage of individuals engaged in postal business.

110 S.Ct. at 3120.[13] The postal sidewalk

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[13] In holding that a regulation requiring members of the International Association of Krishna Consciousness to

here was constructed for the sole purpose of assisting postal patrons to "negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." Id.

The Torrington post office walkway is separated from the municipal sidewalks by the post office parking area. "The isolated nature of the building and the surrounding walkway indicate to all who approach that the walkway services postal patrons entering the building and that it is not a thoroughfare for passersby intent on other errands." Monterey County, 812 F.2d at 1197. This fact is sufficient to overcome the presumption of public forum status

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confine their distribution, sales, and solicitation activities to a fixed location, the Court in Heffron compared the continuing openness of a public street with the temporary nature of the fair grounds. 452 U.S. at 650.

otherwise accorded sidewalks. It is evident to all who enter the property that "they have entered some special type of enclave," Grace, 460 U.S. at 180, dedicated to a specific business function. Thus, the right of access under consideration in the instant case is not the quintessential public sidewalk addressed in Frisby v. Schultz, 487 U.S. 474 (1988) (residential sidewalk held to be a public forum).

The plaintiff argues that even if the sidewalk is not a traditional public forum, the government's attempt to regulate its use for expressive activities must still be analyzed under the rules applicable to public fora because the Postal Service transformed the walkway into a limited public forum by permitting certain groups to use postal premises for expressive activities. This court again disagrees. The critical factor in deciding whether the

government has created a limited public forum is its intention. The "government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." Cornelius, 473 U.S. at 802 (emphasis in original). Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. Perry, 460 U.S. at 47.

In the instant case, at no time did the postal service open wide the doors to indiscriminate use by the public. The postal service has not explicitly dedicated its sidewalks to any expressive activity. Admittedly, individuals or groups have been permitted to leaflet, speak and picket on postal premises. However, a practice of

allowing some speech activities on postal property does not add up to the dedication of postal property to speech activity. Kokinda, 110 S.Ct. at 3121. "Selective access does not transform government property into a public forum." Id. (quoting Perry, 460 U.S. at 47). Here the uses made of the property were limited, and such "selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." Greer, 424 U.S. at 838, n.10.[14] This court thus finds that the postal walkway at issue in the instant challenge is a nonpublic forum.

B.

Because the Torrington Post Office

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[14]Even if a limited public forum had been created, the government is not required to maintain the character of the forum indefinitely but may withdraw the designation of particular property as a limited public forum. Perry, 460 U.S. at 46.

walkway is not a traditional or limited public forum open to the plaintiff, it falls into the third class of property, a nonpublic forum, thus obviating the need to determine whether the regulation is supported by a compelling government interest. Rather, the rules governing nonpublic fora apply, necessitating instead a determination as to whether the regulation on campaigning is reasonable[15] as well as content-neutral, i.e., not simply a mask for Postal Service opposition to the plaintiff's views.[16] The defendant

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[15]"The government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808.

[16]Although a speaker may be excluded from a nonpublic forum if he wished to address a topic not encompassed within the purpose of the forum, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), or if he is not a member of the class of speakers for whose benefit the forum was created, see Perry, 460 U.S. at 49, the government

asserts that the prohibition against campaigning for public office on postal premises is content-neutral and reasonable for two reasons. First, such a complete ban on campaigning insulates the Postal Service from politics. Specifically, the ban on political campaigning ensures that the Postal Service remains removed from partisan politics, that it does not appear to be influenced by politics, and that the public trust in a nonpartisan Postal Service is reaffirmed.[17] Secondly, the ban

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violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject. Cornelius, 473 U.S. at 806.

[17]With respect to this third politically related concern, the defendant has failed to allege any facts which, if proved, might show that public confidence in the system would be diminished by partisan political activity. See Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980) ("mere speculation of harm does not constitute a compelling state interest.")

on political campaigning prevents the disruption of the operations and primary functions of the postal service. This court finds neither of these arguments persuasive.

1. The Lack of Content Neutrality

As noted in Monterey County, government control over nonpublic fora includes:

> [t]he right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

812 F.2d at 1198 (quoting Perry, 460 U.S. at 49). See also Cornelius, 473 U.S. at 808. In the instant case, there is no evidence that the post office regulation is intended to encourage or discourage one

political viewpoint over another. Thus, the defendant asserts that by excluding all political campaigning, the post office is not granting to "one side of a debatable public question . . . a monopoly in expressing its views. . . .." City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976). The exclusion of all political campaigning, however, does not make the regulation content-neutral. Any restriction on speech relating to the substance of the speech is content-based, no matter what the government's interest may be. Boos v. Barry, 485 U.S. 312, 335-338 (1988) (Brennan, J., concurring in part and concurring in judgment). Here, the regulation is not content-neutral because it is tied explicitly to the content of the speech. The solicitation of signatures on a petition bearing no relation to politics is

permitted on postal premises whereas the solicitation of signatures in a political campaign is prohibited. Thus, the prohibition depends entirely upon the content of the petition.

The government argues that its interest in this case is related to the suppression of expression because the evil at which the postal regulation is aimed is the danger of political affiliation and the disruption of the operations and primary functions of the postal service which would result from annoying postal customers and discouraging them from patronizing the postal offices. See Kokinda, 110 S.Ct. at 3134 (Brennan, J., dissenting). The Post Office is concerned that being asked to endorse a political candidate may be annoying to some people, particularly when the campaigner is a member of a disfavored political persuasion. The defendant makes

much of the complaints received at the Torrington Post Office while the plaintiff was soliciting signatures. Memorandum in Support of Defendants' Motion for Summary Judgment, at 8 (filing 24). The record, however, demonstrates no complaints related to any difficulty in obtaining access to the post office. Although the Postal Service's paternalism may be well intended, a listener's reaction to speech is not a content-neutral basis for regulation. Speech is not subject to regulation "'simply because it may embarrass others or coerce them into action.'" Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988), (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).[18]

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[18]The Postal Service's desire to protect customers from speech with which they might disagree would not be a valid basis for regulation. Although the Supreme Court has held that speech in a nonpublic forum may be regulated so as to prevent

2. The Reasonableness of the Regulation

The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all the surrounding circumstances. Cornelius, 473 U.S. at 808. Although avoiding the appearance of political favoritism and preventing the obstruction of post office entrances and the disruption of postal functions are valid justifications for limiting speech in a nonpublic forum, see Greer v. Spock, 424 U.S. at 839; Lehman v. City of Shaker Heights, 418 U.S. at 304, the distinction drawn by the postal regulation between

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disruption of the forum Cornelius, 473 U.S. at 811, a restriction cannot be premised on the mere fact that some members of the public might disapprove of a speaker's message or means of delivery. Such expression "is still protected speech even in a nonpublic forum." Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987). Kokinda, 110 S.Ct. 3115, 3138, n.13. (Brennan, J., dissenting).

signature solicitation for non-political reasons and political signature solicitation is not a reasonable one.

The plaintiff correctly asserts that the regulation, with respect to the elimination of obstructions to entry into the post office building and the disruptions of postal functions, is underinclusive. The regulation is underinclusive in that the postal service does not subject to the same categorical prohibition many other types of signature solicitation presenting the same risk of obstruction and disruption. The regulation permits other expressive activities that harbor the same potential for obstruction and disruption, i.e., voter registration by non-partisan organizations and signature gathering for purposes other than campaigning. For this reason, not only is this a content-based exclusion; it is

unreasonable as well.

Moreover, the ban on the solicitation of funds upheld by the Supreme Court in Kokinda noted, solicitation of alms or contributions requires a distinct action by those who would respond. "The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." Kokinda, 110 S.Ct. at 3123. Thus, soliciting funds is an inherently more intrusive and disruptive activity than soliciting campaign signatures, where all that is required is a signature on a petition rather than a search for a wallet, a checkbook or a credit card. The distinction between the solicitation of funds and the solicitation

of signatures in a political campaign is supported by the second circuit's recent holding "that the Port Authority must provide reasonable access to the [airline] terminals for the distribution of literature." Int'l Soc'y for Krishna Consciousness v. Lee, 1991 U.S. App. Lexis 2264 (2nd Cir. Feb. 8, 1991).[19] In Lee, the second circuit interpreted Kokinda to allow the distribution of literature, or leafletting, in nonpublic fora such as a postal walkways or airline terminal walkways, in contrast to the solicitation

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[19] The Lee court, relying on Kokinda, rejected the views of other circuits, holding that airport terminals are not public fora because they are remote from pedestrian thoroughfares and are intended solely to facilitate air travel. Thus the court held that the solicitation of funds may be banned in the terminals, whereas the distribution of leafletting must be permitted.

of funds.[20] Indeed, the critical

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[20]The Lee court analyzed the Justices' position in Kokinda on expressive activities other than the solicitation of funds in non-public fora as follows:

> The four dissenting justices believed the sidewalk to be a public forum and additionally indicated that they perceived no relevant distinction between the in-person solicitation of funds and the distribution of leaflets. See 110 S.Ct. at 3126-39. They would therefore allow the latter in the air terminals in question. So too, we believe, would Justice Kennedy, whose concurring opinion stressed the need "to protect public places where traditional modes of speech and forms of expression can take place." 110 S.Ct. at 3125. Justice Kennedy relied entirely upon the distinction between the disruptive effect of the in-person solicitation of funds and the lesser inconvenience of the distribution of literature in upholding the Postal Service regulation and did not reach the public/nonpublic forum issue. We thus count him as having adopted a view that would permit the distribution of literature in the instant matter. We also note that the four justices who considered the post office sidewalk to be a nonpublic forum also relied in part on the distinction between in-person solicitation of funds and leafletting in upholding the

distinction in Kokinda was the inherent disruptiveness and intrusiveness of the solicitation of funds as opposed to other forms of expressive activity. Thus the Kokinda analysis of the reasonableness of the ban on solicitation of funds is inapplicable to the instant case.

Political campaigning, i.e., the solicitation of signatures in a political campaign, is no more intrusive than other forms of signature solicitation or distribution of literature that are permitted in the post office. Moreover, political campaigning is far less obtrusive than the political rallies[21] referred to by

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regulation. See 110 S.Ct. at 3123. There was thus at least a majority, and perhaps more, that would allow the latter.

[21]The authorization for political rallies to be held on post office premises flies in the face of the defendants' contention that the goal of the instant regulation is to prevent political

Justice Brennan[22] or the non-political demonstrations such as support for the war or anti-war rallies seen recently or pro-choice of pro-life rallies, none of which are prohibited on post office premises.

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favoritism. Not only is political campaigning less obtrusive and disruptive than political rallies; the potential for political favoritism in the former situation is much less than in the latter.

[22] In his dissent in Kokinda, Justice Brennan correctly asserted that:

> [a] solicitor who asks for funds and offers literature for sale outside the entrance to a post office is no more likely to block access than is a leafletter who stands in the same place or a speaker who sets up his soapbox there. In fact, solicitors may be quite unlikely to attract much of an audience. . . . Under the regulation, a group may stage a political rally to call attention to the problem of drug abuse and draw hundreds or even thousands of persons to an area just outside the entrance to the post office, because there is no general prohibition on large gatherings on postal premises.

Kokinda, 110 S.Ct. at 3137 (Brennan, J., dissenting) (footnotes omitted).

This inconsistent treatment renders the prohibition on campaigning unreasonable. As stated, the postal service undeniably has a legitimate interest in avoiding political favoritism, avoiding disruption of its postal facilities, and ensuring that its buildings remain accessible to the public. The government interest in preventing disruption of post office business or harassment of postal patrons, however, is addressed by the direct prohibitions on such conduct in existing postal rules[23] and the Postal

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[23]Post office rules prohibit individuals from obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. For example, Section 232.1(e) provides that:

> Disorderly conduct, or conduct which creates loud and unusual noises, or which obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to

Service has not explained why these provisions are inadequate to deal with any such disruptions caused by campaigning.

CONCLUSION

For the foregoing reasons, the ban on campaigning for public office on post office premises is neither reasonable nor content-neutral. Therefore, this court finds 39 C.F.R. 232.1(h) to be invalid to the extent that it forbids such campaigning on exterior post office sidewalks. Accordingly, the plaintiff's motion for summary judgment is granted and the defendant's motion for summary judgment is

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> impede or disturb the public in transacting business or obtaining the service provided on property, is prohibited.

39 C.F.R. 232.1(e). Similarly, subsection (k)(2) prohibits "[t]he blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on [postal] property." See also §232.1(c) which prohibits "creating any hazard to persons or things."

denied.

SO ORDERED this 8th day of April, 1991 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 AHN

UNITED STATES POSTAL SERVICE, et al.

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Alan H. Nevas, United States District Judge, and,

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the plaintiff's motion and denying the defendants motion.

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiff.

Dated at Hartford, Connecticut, this 9th day of April, 1991.

KEVIN F. ROWE, Clerk

BY: _____
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 AHN

UNITED STATES POSTAL SERVICE, et al. August 12, 1988

AFFIDAVIT

Frank Longo, being duly sworn, deposes and says:

1. I have first hand knowledge of the fact set out below, I am over the age of eighteen years, and I understand and believe in the obligations of an oath.

2. I am a resident of Bristol, Connecticut, and a longtime participant in Connecticut state and municipal politics.

3. I am the plaintiff in this lawsuit.

4. In 1955, I was elected to the Town of Bristol Board of Tax Review.

5. In 1967 and 1969, I was elected to the Bristol Town Council, with victories in

Democratic Party primaries and the general elections.

6. In 1971 and 1973, I was elected Mayor of the Town of Bristol, prevailing in Democratic Party primaries and the general elections.

7. In 1979, 1981, and 1985, I unsuccessfully ran for Mayor of the Town of Bristol as an independent candidate.

8. In 1986, I ran for Governor of the State of Connecticut as an independent candidate. I qualified for a place on the ballot in the general election by collecting signatures on petitions from approximately 23,000 registered voters.

9. I used post offices as the primary sites for collecting petition signatures during my gubernatorial campaign. I collected signatures at numerous post offices including those in Bethel, Bristol, Danbury, Southington, Plainville, Westport,

Westbrook, Niantic, Farmington, Middletown, Meriden, West Haven, Winsted, Torrington, New Britain, Waterbury, New London, Thomaston, Terryville, Bloomfield, Naugatuck, Derby, Ansonia, and Wolcott. At no time during my gubernatorial campaign was I informed by postal service or law enforcement personnel that my electioneering was in violation of post office regulations.

10. In 1988, I attempted to run for United States Senate from Connecticut as an independent candidate. I needed to secure approximately 9800 signatures to qualify for a place on the ballot. I collected over 8,000 signatures.

11. Throughout my political career, I have run as an anti-establishment candidate, campaigning repeatedly against corruption on the part of elected officials and government employees.

12. I decided to run for the Senate against Senator Weicker because I disapproved of Senator Weicker's opposition to Judge Bork's nomination to the Supreme Court and because I disagreed with remarks made by Senator Weicker regarding the hijacking of the Achille Lauro by terrorists in the Mediterranean Sea. In my campaign, I planned to advocate a return to traditional values in all facets of American life.

13. On January 4, 1988, I secured petition forms from the Connecticut Secretary of State's Office for the Senate race. This was the first day on which the forms were available to members of the public.

14. My strategy for collecting petition signatures was predicated on the tactics I employed in my campaigns in Bristol and my statewide gubernatorial

effort. I did not plan to campaign heavily in the winter because persons are not receptive when the weather is cold to interrupting their routines, listening to a political appeal, and signing a petition. I intended to campaign every day with the onset of spring.

15. I began campaigning on a daily basis, weather permitting, in the spring immediately after Easter. I planned to use public areas in front of post office buildings as my primary site for collecting signatures. My normal practice was to set up a three foot by three foot card table in a nondisruptive location on post office property, sit on a folding chair at the table, offer leaflets to members of the public and request signatures.

16. Attached to this affidavit as "Longo Exhibit A" is an authentic copy of a leaflet that I distributed during my

senatorial campaign.

17. I campaigned at numerous post offices during my 1988 campaign, including those at Bethel, Danbury, Southington, Plainville, Westport, Westbrook, Niantic, Farmington, Bristol, Middletown, Meriden, West Haven, Winsted, Torrington, New Britain, Waterbury, New London, Thomaston, Terryville, Bloomfield, Naugatuck, Derby, Ansonia, and Wolcott. No post office or law enforcement personnel complained to me about my campaigning other than at the Torrington and New Britain post offices.

18. I campaigned at the Torrington Post Office (hereafter "the Post Office") on numerous occasions in 1988. This location was a fertile site for collecting signatures. The fewest number of signatures that I secured on any of my appearances in Torrington was 187.

19. The Torrington Post Office is

located on property owned by the Postal Service. The post office building is set back over 96 yards from the public road adjacent to the property. The building is separated from the road by a large parking lot. The building is separated from the parking lot by a sidewalk (hereafter "the post office sidewalk") that runs the length of the building and is approximately 5 2/3 yards wide.

20. The parties have filed a Joint Statement of Material Facts not in Dispute (hereafter "the Joint Statement"). Attached to this document as Exhibit 20 (hereafter Stip Ex. 20) is a diagram of the grounds of the Torrington Post Office. The numbers on the diagram reflect the dimensions of the property in feet.

21. The parties have stipulated to the authenticity of photographs that are attached to the Joint Statement.

(a) Stip. Ex. 1 and 9-11 are photographs of the Torrington Post Office taken from the proximity of the public road adjacent to the property.

(b) Stip. Ex. 2 through 6 and 14 through 16 are photographs illustrating the length and width of the "post office sidewalk." There is a bed of shrubs in the middle of the post office sidewalk. The width of the sidewalk on either side of the shrubs is substantially larger than the width of a typical municipal sidewalk.

(c) Stip. Ex. 7, 8, 12 and 13 are photographs of the Torrington Post Office building taken from the parking lot. On the left side of Exhibit 12 as it faces the reader, there is an enclosed self service area. Moving to the right on Exhibit 12, there is a door which is the public entrance to the Post Office Building. Close ups of the door are set out in Exhibit 8

and 17 through 19.

22. On most of the days when I campaigned at the Torrington Post Office, I located my table on the post office sidewalk close to the parking lot. This area is marked on Stip. Ex. 20 as "Loc. 1." I was able to address patrons from this location without in any way impeding access or hindering postal operations.

23. I campaigned at the Torrington Post Office on May 25, 1988. Because the weather was inclement, I moved my table from a location on the post office sidewalk close to the parking lot to a place on the post office sidewalk immediately next to the building and under an overhang. This location is marked on Stip. Ex. 20 as "Loc. 2". My new location was immediately next to coin-operated newspaper distribution boxes. The width of my table hardly extended beyond the width of the boxes. I was able

to campaign from this location without in any way impeding access or hindering postal operations.

24. Attached to this affidavit as "Longo Exhibit B" is an accurate photograph of my location at the Torrington Post Office when I moved next to the coin-operated newspaper boxes as described in paragraph 23.

25. While I was campaigning at the Post Office on May 25, Postmaster Victoria informed me that it was illegal to campaign for elective office on post office property and asked me to leave. I refused. Postmaster Victoria called the Torrington Police Department and I was arrested for criminal trespass.

26. "Longo Exhibit B" (attached to this affidavit) accurately depicts my arrest by officers from the Torrington Police Department.

27. On July 13, 1988, the criminal charges were dismissed.

28. I largely halted my campaigning during the seven week period while the criminal charges were pending. I feared campaigning at other post offices out of concern for additional criminal prosecutions. This was the first occasion on which I had ever been arrested. I was so preoccupied by the experience that I was unable to devote my energies to campaigning at other, albeit less productive, locations.

29. After the criminal charges were dismissed, I resumed campaigning at the Torrington Post Office and at other post offices.

30. Prior to my arrest, I was on schedule to gather a sufficient number of signatures to qualify for the ballot. The last day for submitting petitions to the

Secretary of State was August 12, 1988. As of that day, I had collected over 8,000 signatures. I needed approximately 9,800 signatures to qualify.

31. I am currently a candidate for Mayor of Bristol in an election to be held in November 1989. I qualified for a place on the ballot as an independent candidate by collecting signatures on petitions. I used the Bristol Post Office as a prime location for collecting signatures.

32. I plan to run for statewide office as an independent candidate in the future. In order to qualify for the ballot, I will need to collect petition signatures.

33. Post offices are critical sites for political campaigning. Post offices attract a large number of persons to a public location. Persons who frequent post offices tend to be literate and therefore more receptive to a political appeal and to

signing a petition. Also, persons entering post offices tend not to be carrying groceries or other bulky items that may be a hinderance to the communicating of a political message.

34. Post offices are the best available locations for making contact with large numbers of voters in a public area.

35. I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed:_____ _____

Frank Longo

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK LONGO
Plaintiffs

v. H-88-557 AHN

UNITED STATES POSTAL SERVICE
ALDEN VICTORIA, in his
official capacity as
Postmaster of the
Torrington Post Office

Defendants August 12, 1988

COMPLAINT

I. Preliminary Statement

1. Plaintiff brings this action to vindicate his right and the right of every citizen to engage in political speech and to collect signatures on petitions in order to qualify persons for access to the ballot as political candidates. Specifically, Plaintiff challenges the constitutionality of a postal service regulation which permits petitioning, leafletting, and discourse at the post offices unless the content relates to "...campaigning for

election to any public office...."

II. Nature of Action

2. This action arises under the First and Fifth Amendments of the United States Constitution.

III. Jurisdiction

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1339, and 39 U.S.C. Section 409.

IV. Parties

4. Plaintiff is a resident of Bristol, Connecticut and a citizen of the United States. Plaintiff was the Mayor of Bristol and a member of its City Council from 1967 to 1975. Plaintiff ran for Governor of the State of Connecticut in 1986, having secured a place on the ballot as an independent candidate by collecting signatures on petitions.

5. Defendant United States Postal

Service is responsible for promulgating and enforcing rules relating to the operations of branch post offices.

6. Defendant Alden Victoria is the Postmaster of the Torrington Post Office. He is being sued in his official capacity.

V. Factual Allegation

7. In the fall of 1987, Plaintiff decided to run for United States Senator from Connecticut in the 1988 election. Plaintiff planned to run as an independent candidate and to collect petitions in order to gain a place on the ballot.

8. Plaintiff secured petition forms from the State of Connecticut on January 4, 1988, the first day on which petition forms were made available for distribution.

9. Plaintiff began collecting signatures immediately upon receiving the petition forms and continued this activity through May 25, 1988.

10. On May 25, 1988, Plaintiff solicited signatures on a sidewalk in front of the United States Postal Service branch in Torrington, Connecticut. The sidewalk is the property of the Postal Service. Plaintiff situated himself so that he was not blocking pedestrians or vehicle traffic or otherwise interfering with Postal Service operations.

11. While Plaintiff was collecting signatures at the Torrington Post Office, he was approached by Postal Service employees, including Defendant Victoria, and ordered to cease his petitioning activity. When he refused to do so, he was arrested for criminal trespass by the Torrington Police Department.

12. The criminal charges against Plaintiff were dismissed on July 13, 1988.

13. Defendants secured Plaintiff's arrest pursuant to the following Postal Service

policy as contained in the Postal Operations Manual Section 221.654:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and the display or distribution of commercial advertising on postal premises are prohibited.

39 C.F.R. §232.1(h)(1) (1985) (hereafter "the Challenge Regulation").

14. Consistent with the Challenge Regulation, persons throughout the country may engage in protected speech activity on Postal Service property, including collecting signatures on petitions. These activities are permitted so long as the speaker is not "campaigning for election to any public office".

15. Post offices are critical sites for the collection of petition signatures and for political campaigning. With the advent of privately owned shopping malls

and the resulting decline in pedestrian flow in many downtown areas, the significance of post offices as a forum for political activity has been magnified.

16. As a result of Plaintiff's arrest, his ability to gather signatures during the current senatorial campaign has been significantly impeded.

17. Plaintiff plans to run for Governor of the State of Connecticut in the 1990 election as an independent candidate. He plans to secure a place on the ballot by collecting signatures on petitions.

18. Without the ability to collect signatures at the Torrington Post Office and other post offices, Plaintiff's ability to effectively engage in political speech will be significantly curtailed.

19. As a consequence of the Challenged Regulation and its enforcement, Plaintiff has and will continue to suffer

irreparable injury and has no adequate remedy at law.

VI. Causes of Action

20. The Challenge Regulation violates the First and Fifth Amendments to the United States Constitution in that:

(a) it constitutes impermissible content discrimination in a public forum; and

(b) it significantly and unnecessarily inhibits protected political speech in a public forum.

WHEREFORE, Plaintiff prays that this Court:

1. Enter a declaratory judgment that the Challenged Regulation violates the First and Fifth Amendments to the United States Constitution to the extent that it prohibits activity relating to "campaigning for election to any public office".

2. Issue a permanent injunction

enjoining Defendants and their agents from enforcing the Challenged Regulation as it applies to "campaigning for election to any public office".

3. Grant the Plaintiff his costs and attorney's fees.

4. Order such other relief as justice may require.

PLAINTIFF
Frank Longo

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For Blume & Elbaum

Martha Stone
Connecticut Civil
Liberties Union
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Hartford, Conn. 06106

Martin Margulies
University of
Bridgeport School
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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

39 C.F.R. §232.1(h)(1), contained in the Postal Service Manual §221.654, provides in full:

(1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:

(i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in §243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by [the Office of Personnel Management].

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 91-1988

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK LONGO, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STUART M. GERSON
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QUESTION PRESENTED

Whether a United States Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property violates the First Amendment to the United States Constitution.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-16A) is reported at 953 F.2d 790. The opinion of the district court (Pet. App. 19A-65A) is reported at 761 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1992. A petition for rehearing was denied on March 9, 1992. Pet. App. 17A-18A. The petition for a writ of certiorari was filed on June 8, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, petitioner attempted to run for the United States Senate as an independent candidate from Connecticut. Pet. App. 3A. In order to qualify for a place on the ballot, he was required to collect approximately 9,800 signatures on petitions. On May 25, 1988, petitioner set up a table and chair on the off-street access walkway adjacent to the entrance of the Torrington, Connecticut Post Office to solicit signatures in support of his candidacy. *Ibid.*

The Torrington, Connecticut Post Office is located on property owned by the United States Postal Service. Pet. App. 22A-23A. The off-street access walkway is a concrete apron surrounding the Post Office building. It is located entirely on Postal Service property, and is adjacent to and leads to the entrance of the post office building. It is separated from the municipal sidewalks and streets by a parking lot, driving lanes, and garage space for postal service vehicles. *Id.* at 23A. The walkway provides the only means by which customers of the post office may travel from the parking lot to the post office building. *Ibid.*

The Postmaster informed petitioner that his actions violated a Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property. Pet. App. 3A-4A. The postmaster showed petitioner a copy of the regulations and asked him to leave, but he refused. *Id.* at 4A. When he continued to ignore the Postmaster's requests, petitioner was arrested by the Torrington Police and charged with criminal trespass. On July 13, 1988, the charges against petitioner were dropped in exchange for his promise to cease campaign activities at the post office. *Ibid.* Petitioner nevertheless returned on four separate

occasions to solicit signatures, each time setting up a table and chair on the access walkway. Several postal patrons complained that petitioner was abusive when they refused to sign his petition or when they questioned him as to his reasons for using Postal Service property. *Id.* at 4A, 22A.

2. On August 12, 1989, petitioner filed this action in federal district court seeking declaratory and injunctive relief under 42 U.S.C. 1983. Pet. App. 4A. Petitioner alleged that the postal regulation codified at 39 C.F.R. 232.1(h)(1) was invalid, both facially and as applied, under the First Amendment to the United States Constitution. Pet. App. 4A. In April 1991, the district court granted summary judgment in petitioner's favor. *Id.* at 64A-65A. It held that the off-street access walkway was not a public forum, but concluded that the challenged regulation nevertheless violated the First Amendment because it was content-based and underinclusive. *Id.* at 50A-65A.

3. On appeal, the United States Court of Appeals for the Second Circuit reversed. Pet. App. 16A. The court declined to determine the walkway's status as a forum for First Amendment purposes, finding instead that the postal regulation at issue was a reasonable time, place, or manner restriction that could survive scrutiny even in a traditional public forum. *Id.* at 8A.

The court found that the regulation met the test for a reasonable time, place, or manner restriction because it was narrowly tailored to serve a significant government interest, left open ample alternative means of communication, and was content-neutral. Pet. App. 8A. The court held that the regulation served a significant government interest because "it enables the Postal Service to avoid both actual entanglement in partisan politics and the appearance of political favoritism." *Ibid.*; see also *id.* at 11A. The

court found the regulation narrowly tailored because it did not proscribe more speech than necessary to address the targeted evil—the danger that the Postal Service would become entangled in partisan politics. *Id.* at 11A. The court further found that adequate alternative means of communication were available because politicians remained free to campaign on the nearby municipal streets, sidewalks, and other public spaces, and to utilize the various news media and the mail. *Ibid.* Finally, the court held that, although the regulation was "somewhat based on subject matter," it did not "reflect an attempt to regulate the scope of public debate," and therefore was "sufficiently content-neutral to pass scrutiny as a reasonable time, place and manner restriction." *Id.* at 14A-15A.

The court denied a petition for rehearing and suggestion of rehearing en banc. Pet. App. 17A-18A.

ARGUMENT

The court of appeals' decision is correct and does not present any issue on which the courts of appeals are divided. Therefore, review should be denied.

1. Petitioner argues (Pet. 11) that the Court should review this case to resolve a conflict in the circuits concerning the "forum status" of an off-street postal walkway—that is, whether such a walkway is a traditional public forum or a nonpublic forum for the purpose of conducting First Amendment activities. The court below, however, did not decide that question, and there is no present conflict on it in any event. Nor is there any conflict among the circuits on the question that the court below did decide.

The court of appeals in this case held that the Postal Service regulation barring campaigning for public office on postal property, codified at 39 C.F.R. 232.1(h)(1), is consistent with the First Amendment,

regardless of the forum characterization of the off-street access walkway. To our knowledge, no other court of appeals has passed on the constitutional validity of this regulation as applied to the solicitation of signatures,[1] and petitioner does not contend otherwise. Thus, there is no conflict in the circuits on the question decided in this case.

There also is presently no conflict among the courts of appeals concerning the forum status of off-street postal walkways such as the one on which petitioner attempted to conduct his activities. Although the Fourth Circuit had held in *United States* v. *Kokinda*, 866 F.2d 699 (1989), in the course of striking down a regulation prohibiting solicitation on postal property, that a similar off-street walkway was a public forum for First Amendment purposes, that decision was reversed by this Court, see *United States* v. *Kokinda*, 110 S. Ct. 3115 (1990). To be sure, no one view of the forum status of the post office walkway in *Kokinda* garnered the support of a majority of the Court. However, the Court did reverse the only decision in which a court of appeals had held that this type of off-street postal walkway is a traditional public forum. Thus, there is currently no authority in the circuits for that proposition. Indeed, other than the Fourth Circuit in *Kokinda*, no court of appeals has ever struck down a postal regulation as violating the First Amendment, whether on the ground that the property at issue was a public forum or on any other basis.[2]

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[1] *United States* v. *Bjerke*, 796 F.2d 643, 649-650 (3d Cir. 1986), upheld 39 C.F.R. 232.1(h)(1) as applied to the solicitation of campaign contributions.

[2] In upholding the ban on solicitation that was also at issue in *Kokinda*, the Eleventh Circuit held in *United States* v. *Belsky*,

Moreover, even if the circuits were in conflict on the "forum status" of off-street postal walkways, this case would not present an occasion for addressing that issue. The court of appeals declined to decide whether the postal walkway was a public or nonpublic forum. Rather, it held that the ban on campaigning for public office was a reasonable time, place, or manner regulation that would withstand scrutiny in any forum. This Court does not ordinarily address issues not decided by the courts below. See *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990); *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1534 (1992). Because this case presents no question on which the courts of appeals are divided, certiorari should be denied.

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799 F.2d 1485, 1489 (1986), that an off-street postal walkway is not a public forum. Contrary to petitioner's contention (Pet. 9 n.2.), neither the Third nor the Ninth Circuit has held that such off-street postal walkways are "designated fora." In *United States* v. *Bjerke*, 796 F.2d 643, 649-650 (3d Cir. 1986), which concerned a challenge to the application of 39 C.F.R. 232.1(h)(1) to bar the solicitation of campaign contributions, the court specifically rejected the argument that the off-street postal walkway was a designated public forum. In *Monterey County Democratic Central Comm.* v. *United States Postal Service*, 812 F.2d 1194, 1198 (9th Cir. 1987), in considering a challenge to a regulation banning voter registration by partisan groups, the court stated that, even if it were to find that the off-street walkway at issue qualified as a "limited public forum," the regulation would still be valid. However, it did not rest its decision on the finding that the walkway was such a "designated" forum. In any event, the court's suggestion in *Monterey County* that the postal walkway might qualify as a "limited public forum" related only to its use by "specific groups to register voters." This case, in contrast, concerns the ban on campaigning for public office, to which there are no exceptions for any groups.

2. In deciding that the ban on campaigning on Postal Service property is a valid time, place, or manner restriction, the court of appeals found that the restriction met the requirement that it be "content-neutral." See *Frisby* v. *Schultz*, 487 U.S. 474, 481 (1988). After the court of appeals issued its decision, this Court decided *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992). The rule challenged in *Burson* was similar to the regulation at issue here: it prohibited, *inter alia*, the display or distribution of campaign materials within 100 feet of the entrance to a polling place. All eight of the Justices who participated in *Burson* appeared to agree that the rule was content-based because it discriminated on the basis of subject matter. See 112 S. Ct. at 1850 (plurality opinion) ("[w]hether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); see also *id.* at 1858-1859 (Kennedy, J., concurring); *id.* at 1859 (Scalia, J., concurring in the judgment); *id.* at 1864 (Stevens, O'Connor, and Souter, JJ., dissenting).[3]

The opinions in *Burson* call into question the court of appeals' holding that the regulation banning campaigning on postal property is "content-neutral." Even if the regulation could not be regarded as "content-neutral," however, the decision to uphold the regulation would still be correct. As the government argued before this Court in *Kokinda*, see Gov't Br. 16-42, under accepted principles of forum analysis, an off-street postal walkway with the characteristics of the one at issue here is not a traditional public forum. The walkway is not a public thoroughfare, but instead leads only from the postal parking area to the post

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[3] Justice Thomas did not participate in *Burson*.

office building. It was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Kokinda*, 110 S. Ct. at 3120 (plurality opinion). See *United States* v. *Belsky*, 799 F.2d at 1489 (postal access walkway not a traditional public forum); *United States* v. *Bjerke*, 796 F.2d at 649 (same); *Monterey County Democratic Central Comm.* v. *United States Postal Service*, 812 F.2d at 1197 (same). See also *International Society for Krishna Consciousness, Inc.* v. *Lee*, No. 91-155 (June 26, 1992), slip op. 6-10 (airport terminal not public forum). The regulation banning campaigning for public office on postal property, even if not content-neutral, serves a legitimate government purpose, see Pet. App. 8A, 11A, and does not discriminate as to viewpoint. *Id.* at 15A. It is therefore a valid restriction on speech in a nonpublic forum. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
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DOUGLAS N. LETTER
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Attorneys

JULY 1992

FILED
SEP 18 1992
OFFICE OF THE CLERK

No. 91-1988

In The

Supreme Court of the United States

October Term, 1991

FRANK LONGO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity
as Postmaster of the Torrington Post Office,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

When Frank Longo filed his certiorari petition, the cases of International Society for Krishna Consciousness Inc. v. Lee, 112 S.Ct. 2701 (1992) and Lee v. International Society for Krishna Consciousness, 112 S.Ct. 2709 (1992) were still pending before this Court. Both have now been decided, and indeed the Postal Service relies upon the former in its Brief for the Respondents in Opposition. Pursuant to Rule 15.7 of the Rules of this Court, Mr. Longo respectfully submits this Supplemental Brief in order to discuss the applicability of the Lee decisions to this case.

REASONS FOR GRANTING THE WRIT

The Postal Service appears to concede that the Second Circuit erred in characterizing the "no-campaigning" rule as content-neutral. Brief in Opposition 7. As the Postal Service recognizes, the

concession is compelled by this Court's later ruling in Burson v. Freeman, 112 S.Ct. 1846 (1992). The Postal Service nevertheless argues that the Second Circuit's error was harmless, because Lee establishes that post office sidewalks are nonpublic fora. Brief in Opposition at 7-8.

Lee's impact, however, is not as clear as the Postal Service supposes. Even assuming that the sidewalks are nonpublic fora - which itself is not a foregone conclusion[1] - it is questionable whether the no-campaigning rule can survive rational basis review. That standard of review, as applied in Lee, is by no means toothless. In sustaining the airport terminals' no-solicitation rule, for

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[1] See Pet. 23-25.

instance, the Court noted, as evidence of the rule's reasonableness, that solicitors had access to at least a portion of the premises - a portion, moreover, used by 97 per cent of the target audience. 112 S.Ct. at 2708-2709. The no-campaigning rule, in contrast, bars campaigning anywhere on post office property, and access from the surrounding municipal sidewalks is - as Mr. Longo has argued throughout this lawsuit - woefully incomplete and inadequate. And Justice O'Connor, whose vote was pivotal in both Lee decisions, found the no-solicitation rule reasonable because the record confirmed that solicitation had created serious congestion problems. 112 S.Ct. at 2713, 2714.[2] There is no evidence

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[2] Interestingly, she also explained Greer v. Spock, 424 U.S. 828 (1976) as resting upon the fact that the only materials that the base commander might

whatsoever that campaigning on post office property has ever contributed either to congestion, politicization, or public perception of politicization - the three concerns that the Postal Service asserts in the present litigation. Pet. 32.

In addition, Justice O'Connor joined Justices Kennedy, Souter, Blackmun and Stevens in pronouncing the terminals' no-leafletting rule invalid, even though she, unlike them, found the terminals to be nonpublic fora. Her reasons for doing so are, arguably, equally applicable here:

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disapprove were those that presented "'"a clear danger to [military] loyalty, discipline, or morale."'" 112 S.Ct. at 2714. Both she and Greer "'emphasized'" that the ban did not extend, as it does in Longo, to "'conventional political campaign literature." Id. If this factor was critical, in her view, to the reasonableness of a content-sensitive regulation at a military base, it should be all the more so at a postal facility.

the record revealed no harms "intrinsic to the act of leafletting" that might interfere with airport operations, 112 S.Ct. at 2714, and the government could readily promulgate regulations to contain whatever harms it professed to fear, id. at 2715.[3] Given the absence of any history of harm, and the ease with which any conjectural harms could be averted, campaigning in the instant case seems more

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[3] Justice O'Connor observed that regulations restricting expressive activities to specified portions of the airports were already in place and had functioned successfully during the many years that the lawsuit was in progress. 112 S.Ct. at 2715. The Postal Service likewise has regulations that prevent congestion, see 39 C.F.R. 232.1(e) and 39 C.F.R. 232.1(k)(2), cited in National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 723 n.5 (7th Cir. 1984); and it could easily craft regulations that would avoid the politicization problem. See PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980); McCreary v. Stone, 739 F.2d 716, 728 (2d Cir. 1984), aff'd by an equally divided Court, 471 U.S. 83 (1985).

closely akin to leafletting than to solicitation.

In sum, therefore, important issues do remain, even if post office sidewalks are nonpublic fora as the Postal Service contends.[4] These issues should be resolved either by this Court, or by the Second Circuit on remand. The Postal Service should not be allowed simply to declare victory and depart.[5]

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[4] If the sidewalks are traditional or designated public forums, the no-campaigning rule would presumably fail, inasmuch as it is directed at a "particular...form of speech," Kennedy, J., concurring in the judgment, 112 S.Ct. at 2722.

[5] Mr. Longo is puzzled by the Postal Service's insistence, Brief in Opposition 5, that this Court's plurality opinion in United States v. Kokinda, 110 S.Ct. 3115 (1990), erases the pre-existing conflict among the Circuits as to the forum status of post office sidewalks. It is settled law that, "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken

CONCLUSION

For the reasons set forth in the certiorari petition and in this Supplemental Brief, the petition should be granted, and the case should either be accepted for plenary review, or remanded for reconsideration in light of Burson and Lee.

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by those Members who concurred in the judgmen[t] on the narrowest grounds.'" City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 n.9 (1988), citing Marks v. United States, 430 U.S. 188, 193 (1977). Applying this principle to Kokinda, the "narrowest ground" for the judgment was expressed in Justice Kennedy's separate opinion, viz. that the no-solicitation rule at issue in that case was a valid time, place and manner regulation that could survive scrutiny in any forum. Thus, Kokinda, though it reversed the Fourth Circuit's judgment, did not reject that Circuit's finding that post office sidewalks are traditional public fora. That Lee may do so is a possibility. But that is one of the questions to be decided by this Court or on remand.

Respectfully submitted,

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